No. 82-960

In the Supreme Court of the United States

OCTOBER TERM 1982

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CITY DISPOSAL SYSTEMS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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This brief *amicus curiae* is filed with the written consent of the parties. The letters giving consent have been separately filed with the Court.

I. INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States is a federation consisting of more than 4,000 state and local chambers of commerce and trade and professional associations as well as more than 231,000 business firms and individuals who maintain direct membership. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member employers in important labor relations matters before the courts, the United States Congress, the Executive Branch, and the independent regulatory agencies of the federal government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance its members' interests in a wide spectrum of labor relations litigation.

The Chamber views this case as one of genuine significance to the business community. The holding of the NLRB in this case, if allowed to stand, throws a cloak of immunity from industrial discipline around acts of individual employee insubordination. The Board would require such breaches of plant discipline to be condoned by employers if the employee merely claims subjective reliance on a provision in a union contract. The Chamber's view is that such a rule goes far beyond the intent of the framers of the Act. It is also the Chamber's view that this unwarranted interference by the Board into matters of plant discipline is a threat to orderly production and, as a result, necessarily will adversely affect productivity. The reach of this decision is therefore of concern to virtually all members of the Chamber of Commerce and, indeed, to every citizen, since all of us have a stake in the need for improvement in American industry's productivity.

II. THE ISSUE WHICH CAUSED THIS AMICUS BRIEF TO BE FILED

The issue may, we believe, fairly be stated as follows:

> Whether an individual employee who refuses to perform a work assignment is engaged in "concerted" activity within the meaning of Section 7 of the National Labor Relations Act any time he believes that the assignment contravenes some provision of the applicable collective bargaining agreement.

III. SUMMARY OF FACTS AND PROCEEDINGS

There seems no need in this *amicus* brief for a detailed statement of facts. While there are some differences between the parties as to some aspects of the facts, there seems to be no dispute as to the essentials.

Brown, a driver for a garbage company, refused an assignment to drive a truck, stating that the truck had a brake problem. The conversation with a supervisor at the time became somewhat heated, with Brown saying to one of the supervisors, "Bob, what are you going to do, put the garbage ahead of the safety of the men?" Brown left work, and the Company then allegedly constructively discharged him by notifying him that he had "quit."

A provision in the governing collective bargaining agreement gave each bargaining unit employee the right, under specified circumstances defined in the agreement, to refuse to operate unsafe equipment. Brown filed a grievance alleging a right under that contractual clause to have refused to operate the truck. The grievance was processed through the initial steps of the contractual grievance procedure, but was dropped by the Union short of arbitration as having no merit.

The employee then filed a charge with the NLRB, claiming that his refusal of the driving assignment constituted engaging in "protected concerted activity," and that his discharge was in violation of Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §158(a)(1). The General Counsel issued a complaint so alleging. An Administrative Law Judge found that a Section 8(a)(1) violation had occurred, and the Board affirmed. The Court of Appeals for the Sixth Circuit reversed, finding insubstantial evidence of concerted activity and stating that the Court was "in complete agreement" with Judge Edwards' analysis in a strikingly similar case in the D.C. Circuit. *Kohls* v. *NLRB*, 629 F.2d 173, 177 (D.C. Cir. 1980).

The Board sought *certiorari*, and this Court granted *certiorari* on March 28, 1983 (J.A. 69).

IV. SUMMARY OF ARGUMENT

It is the Chamber's position that individual insubordination does not constitute protected concerted activity for the purpose of mutual aid or protection within the meaning of Section 7 of the Act.

As this Court pointed out some thirty years ago in *Labor Board* v. *Electrical Workers, IBEW*, 346 U.S. 464, 475 (1953):

> Many cases reaching their final disposition in the Courts of Appeals furnish examples emphasizing the importance of *enforcing industrial plant discipline* and of maintaining loyalty . . . *as well as the rights of concerted activities.* The courts have refused to reinstate employees discharged for "cause" consisting of *insubordination, disobedience* or disloyalty . . .
>
> The legal principle that insubordination, disobedience or disloyalty is adequate cause for discharge is plain enough (emphasis added).

It has been widely recognized by labor arbitrators, by the Board, and by the courts that even where a work order may be in some way violative of the collective agreement, the employee to whom it is directed must nevertheless obey the work order and only thereafter may he or she challenge its propriety through established grievance procedures.

Federal safety laws have established certain criteria for determining when an employee may refuse unsafe work assignments. Many collective agreements, like the one here, also define when an employee has the right to refuse to operate unsafe equipment. Arbitrators have interpreted collective bargaining agreements, either with or without such specific exculpatory provisions, as not requiring an employee to jeopardize his life in order to hold his job. No expansive interpretation of the NLRA's Section 7, a provision regulating labor relations matters, not safety matters, is needed to protect employee rights already safeguarded by laws and contract provisions dealing specifically with employee health and safety.

Thus, safety concerns should not be permitted to skew an orderly development of the law with respect to concerted activity, or give added meaning to the old saw that hard cases make bad law. The true issue here is whether the statute can be construed, as the Board has done, to throw Section 7's protective net around an individual employee's refusal to comply with a work order solely because the employee honestly believes (though he does not even assert) that the work order contravenes the terms of a collective bargaining agreement.

This case has some semblance to, but also some significant differences from, cases holding that the making of certain kinds of employee complaints (whether made by one or several individuals) is protected concerted activity.

Whether an individual complaint can constitute protected concerted activity is difficult to answer in the abstract. We will trace, in this brief, some of the development of that doctrine. It is the Chamber's view that the so-called *Interboro* doctrine is sound only to the extent that it is interpreted to limit employer action which threatens the integrity of collectively bargained grievance procedures. The Board has extended it, in this case and others, far beyond that, without legal justification.

In any event, the *Interboro* doctrine, whatever its appropriate scope, should surely not be extended to apply to this case or others of its genre. An employee who commits the individual act of disobeying a work order on the strength of a subjective (and here apparently erroneous) belief that the order contravenes some term of the collective agreement is *not* engaging in protected concerted activity. The orderly functioning of production processes requires that employers be able to count on each employee to perform his or her assigned tasks. That principle has been recognized on the shop floor and implemented in judicial, administrative, and arbitral forums. Neither the language of the Act nor its underlying purposes require or permit that significant concept to be undermined by a legal fiction that individual insubordination is somehow "protected concerted activity." That is why the decision of the Board in this case must be reversed.

V. ARGUMENT

A. Section 7 of the Act Does Not Protect Individual Acts of Insubordination

1. The Law of the Shop Requires that Employees "Obey-Now, Grieve-Later"

(a) The Principle

Certain shop practices have become so widely accepted and regularly recognized in so many decisional forums that they may fairly be said to constitute institutionalized industrial law. This is true of the principle that an employee in the United States, when given a work order, is obliged to carry it out, even if he believes it to be contractually or legally improper; and only after he has done so may he seek corrective or remedial action through established administrative procedures or collectively bargained grievance procedures. This principle has come to be known by the shorthand appellation "obey-now, grieve-later."

(b) Origins of the Rule

The principle probably originated in the decisions of labor arbitrators, not an uncommon source of the law of the shop in American industry. Prasow and Petus in *Arbitration and Collective Bargaining* (1970) offer the following instructive comment at page 42:

> On few questions do arbitrators display as much unanimity in upholding management's right to manage as they do in the area of work assignments. An

> employee must obey orders, carry out assignments, and grieve afterward. He must not take matters into his own hands, resort to "self-help" by by-passing the grievance procedure. Even if the employee is subsequently found to be right and his grievance ruled meritorious, arbitrators will uphold harsh penalties by management for his failure to obey orders and grieve later.

See also Elkouri & Elkouri, *How Arbitration Works* (3d Ed. 1976) 154-159.

The rationale for the rule was succinctly stated by one of the first great labor arbitrators, the late Dean Shulman, in an early volume of published arbitration awards, *Ford Motor Co.*, 3 LA 779, 780-781 (1944):

> Some men apparently think that, when a violation of a contract seems clear, the employee may refuse to obey and thus resort to self-help rather than the grievance procedure. That is an erroneous point of view. In the first place, what appears to one party to be a clear violation may not seem so at all to the other party. Neither party can be the final judge as to whether the contract has been violated. The determination of that issue rests in collective negotiation through the grievance procedure . . .
>
> But an industrial plant is not a debating society. Its object is production. When a controversy arises, production cannot wait for exhaustion of the grievance procedure. While that procedure is being pursued, production must go on. And someone must have the authority to direct the manner in which it is to go on until the controversy is settled. That authority is vested in supervision.

Thus, the principle has been embedded in the literature of industrial dispute resolution for over four decades.

(c) Judicial Acceptance of the Principle

Courts have come to recognize this principle as one of general application. Thus, in *Lewis* v. *Greyhound Lines-East*, 555 F.2d 1053, 1055, n.4, (D.C.Cir. 1977), the court observed, apparently as a matter of established law:

> In other words, it is not the legitimate prerogative of the employee to disobey a supervisory order, even if he believes that his contractual rights are violated. . . . If he deemed that [company] action improper, he should have pursued his remedy through the established grievance procedure.

Similarly, in *Reynolds* v. *Washington Tug & Barge Co.*, 91 L.C. ¶12,825, (n.6), (W.D.Wash. 1980), it was said:

> . . . an employer's action in response to his employee's failure to work now—grieve later are typically upheld regardless if the employee is subsequently found to be correct and his grievance meritorious.

See also Pfefferkorn v. *Borden, Inc.*, 106 LRRM 2036, 2038 (N.D.Ind. 1980).

(d) The NLRB Has Recognized the Principle But Has Embarked on an Ambivalent and Confusing Course

The National Labor Relations Board has also recognized and applied this principle. In *Yellow Freight System, Inc.*, 247 NLRB 177 (1980), the Board affirmed the ruling of an Administrative Law Judge who had found an employee not to have engaged in protected concerted activity when he refused to complete the last leg of his driving assignment on the ground that he could not contractually be required to drive for over ten hours. The Law Judge said:

> Even assuming that it could be found that Novak asserted a reasonably based contractual right, I find that his conduct was not protected because it constituted insubordination. By protesting the job assignment and delaying the continuation of his run in the face of driving-time restrictions, Novak was in effect attempting to work only on his own terms. His conduct was therefore unprotected. See, *John S. Swift Co., Inc.*, 124 NLRB 394, 397 (1959); *NLRB* v. *Montgomery Ward & Co.*, 157 F.2d 486 (8th Cir. 1946).

Id. at 181. *See also National Radio Co.*, 205 NLRB 1179 (1973) where the Board deferred, under *Spielberg Manufacturing Co.*, 112 NLRB 1080, to the decision of long-time arbitrator Archibald Cox, who had upheld the discharge of a union representative who refused to obey a reporting procedure he believed to be improper " 'instead of utilizing his plain and adequate remedy under the grievance procedure for questioning the validity of the reporting requirement.' " *Id.*, at 1179.[1]

Similarly, in *American Ship Building Co.*, 226 NLRB 788 (1976), the Board sustained the discharge of an employee who refused to unload a truck, saying:

> If Krieg believed that as union president he was not required by contract and practice to perform rigger's work, the procedure which he should have followed

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[1] Cf. *Michigan Screw Products*, 242 NLRB 811 (1979), 813-14, cited in the Board's brief, pp. 24, 30, where the Board approved an ALJ's refusal to follow the obey-now grieve-later principle to a situation where an employee had failed to accept an overtime "call-in," but only because the employer had never advised the employee that the acceptance of call-in overtime was mandatory. When employees are aware that overtime assignments are mandatory, the Board has sustained, as properly based on insubordination, discharges of employees who refuse overtime assignments. *Scott Paper Box Company*, 81 NLRB 535, 548 (1949).

> was to obey Van Horn's order and then process a grievance through the grievance procedure of the collective bargaining contract.

Id. 789.

The Board's recognition of the principle is thus unmistakable. Yet in some other cases decided both before and after the above cited cases, which we will detail later in this brief, the Board has taken what seems quite an opposite tack, finding that an insubordinate refusal to carry out an order *is* protected concerted activity when motivated by the employee's belief that the work order was improper under the collective agreement or under some state or federal law or for virtually any reason which the Board finds "of common concern" to employees. The courts of appeal have rarely granted enforcement to the Board's orders in such cases.

2. To Protect Individual Acts of Insubordination Would Be Directly Contrary to the Intent of Section 7

Not only is individual insubordination unprotected by the Act, but it is a confrontational act completely inconsistent with the basic scheme of the Act and, indeed, with the essential intent of Section 7. The reason for granting Section 7 rights to employees is to further the fundamental belief of the NLRA's founders that industrial disputes can and should be peacefully resolved through orderly, collective discussion rather than by chaotic confrontations.

The Act's purpose clause sets forth the aim of:

> . . . removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions . . .

29 U.S.C. §151.

In Title II of the 1947 Act, it was again reaffirmed that:

> It is the policy of the United States that—
>
> (a) Sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of the employer and the employees can more satisfactorily be secured by the settlement of issues between employers and employees through the processes of conferences and collective bargaining between employers and the representatives of their employees; . . .

29 U.S.C. §171(a).

This emphasis on resolution of disputes through collective consultation, as embodied in the National Labor Relations Act, represented some shift in direction from earlier laws which had merely unleashed both individual and collective acts of self-help and had left employers and employees free to do unregulated battle.

The Clayton Act had freed up certain forms of employee protest from the sanctions of the antitrust laws, "whether singly or in concert" (Sections 6 and 20 of the Clayton Act, 15 U.S.C. §17, 29 U.S.C. §52). The Norris-LaGuardia Act had freed from the injunctive powers of the federal courts acts of protest and economic confrontation by employees "whether singly or in concert." 29 U.S.C. §104.

The regulatory scheme of the National Labor Relations Act differs from the Clayton and Norris-LaGuardia Acts' untying the hands of individual employees and their unions. The change in emphasis was noted by this Court in *Boys Market* v. *Clerks Union*, 398 U.S. 235, 251 (1970):

> As labor organizations grew in strength and developed toward maturity, congressional emphasis shifted from protection of the nascent labor movement to the

> encouragement of collective bargaining and *to administrative techniques for the peaceful resolution of industrial disputes.* (Emphasis supplied.)

Because of the Act's emphasis on collective resolution of work place disputes, individual rights under the NLRA are not only not of primary importance, but are necessarily subordinated to collective procedures. It protects individual rights:

> . . . not for their own sake but as an instrument of the national labor policy of *minimizing industrial strife* "by encouraging the practice and procedure of *collective bargaining.*" (Emphasis supplied.)

Emporium Capwell Co. v. *Community Org.*, 420 U.S. 50, 61 (1975). As this Court further observed in *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 at 180 (1967):

> The policy therefore extinguishes the individual employee's power to order his relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.

Relatively early in the administration of the Act, it became obvious that in order to achieve this purpose, it was necessary to interpret the Act in such a way as to recognize both the right of employees to engage in collective action and an employer's need for discipline. In *Republic Aviation Corp.* v. *Board*, 324 U.S. 793, 797-798 (1945), the Court noted:

> These cases bring here for review the action of the National Labor Relations Board in working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon

> employer or employee. *Opportunity to organize and proper discipline are both essential elements in a balanced society.* (Emphasis supplied.)

It would be wholly inconsistent with the purpose of the Act, and of Section 7 in particular, to sanctify, as the Board would here, the right of the individual to engage in a confrontational, insubordinate act. Instead, the individual employee should observe plant discipline and seek his remedy through contractual grievance and arbitration procedures.

The central role of such procedures was emphasized by this Court in the Trilogy. *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574 (1960); *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593 (1960). The primary role of such procedures in the resolution of work place disputes under a collective agreement was again emphasized in *Republic Steel* v. *Maddox*, 379 U.S. 650 (1965), where the Court held that an individual employee does not even have the right to resort to independent, individual litigation to enforce his contractual rights without first exhausting the contractual grievance procedures. The Court there said:

> **Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the "common law" of the plant. LMRA §203(d), 29 U.S.C. §173(d), §201(c), 29 U.S.C. §171(c)**
>
> . . .
>
> **A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a law suit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances.**

***Id.* at 653.**

And in *Emporium Capwell Co. v. Community Org.*, 420 U.S. 50 (1975), this Court held that small groups of employees did not have the right to resort to self-help picketing or to insist on direct dealing with the employer, rather than to follow established grievance procedures, even in the interest of protecting themselves against alleged racial discrimination.

Surely if individuals are forbidden even direct access to court procedures and if groups of individuals may be prevented from resorting to concerted, confrontational self-help because disputes are to be resolved by utilization of contractual grievance machinery, it would be anomalous indeed to permit individual employees to resort to individual, confrontational self-help.

To ignore the obey-now, grieve-later principle and, instead, to accord the Act's protection to an employee who by-passes the collective grievance machinery and registers his complaint by resorting to an individual act of insubordination is, therefore, contrary to the central purposes of the Act.

B. It Is Not Necessary to Expand Section 7 in Order to Grant Appropriate Safety Protection to an Employee Ordered to Perform an Unsafe Act

The beginnings of the Board's departure from the sound obey-now, grieve-later principle arose out of cases which, like this one, had safety implications. The conclusion seems ineluctable that the Board was led down this path by sympathy with what it saw as a dilemma for the employee—should he refuse an order and risk being fired or should he obey the order and risk being hurt? The Board seemed totally unaware that the orderly way out of

that dilemma had already been provided by safety laws and regulations and by negotiated contract provisions. There was and is no need for the National Labor Relations Board to rush to the rescue by distorting Section 7 and construing as "concerted activity" a totally individual act of insubordination. The courts, perhaps accustomed to more vigorously analytical decision-making, have, in all but a few isolated cases, refused to accept the Board's tortured construction.

1. NLRB Tolerance of Insubordination in Safety Cases, Although Not Shared by the Courts, Still Persists, Though Not with Total Consistency

The first safety-related case in which the Board appears to have condoned insubordinate conduct was *Illinois Ruan Transport Corporation,* 165 NLRB 227 (1967). There the Board found "protected concerted activity" when an employee, allegedly out of concern for the safety of his vehicle, departed from his scheduled driving route and, acting on his own and without any authorization from his employer, arranged for an ICC inspection of his vehicle. The Board was reversed in *Illinois Ruan Transport Corporation* v. *NLRB,* 404 F.2d 274 (8th Cir. 1978) because the court found no "concerted activity."

In *United Parcel Service,* 241 NLRB 1074 (1979), a case strikingly similar to the instant case, the Board found an individual employee's refusal to drive a truck because of his alleged concern about the safety of the brakes to be "protected concerted activity." The court of appeals for the D.C. Circuit again found no evidence of "concerted activity" and denied enforcement of the Board's order. *Kohls* v. *NLRB,* 629 F.2d 173 (D.C.Cir. 1980). The opinion in that case was authored by Judge Harry Edwards, a

former distinguished labor law professor at the University of Michigan, and was relied upon by the court of appeals in the case now before this Court.

In *Roadway Express*, 257 NLRB 1197 (1981), the Board found an employee's refusal to drive a truck until after it had been inspected to be "protected concerted activity." Once again, the Court denied enforcement, holding that the individual refusal was not concerted activity. *Roadway Express* v. *NLRB*, ... F.2d ....., 112 LRRM 3152 (11th Cir. 1983)[2]

Although the Board has been quite consistently reversed by the Courts of Appeal in these safety cases, it has nevertheless persisted in a number of cases, none of which have been reviewed in the courts of appeal, finding that an employee's refusal to perform tasks which he or she believes unsafe is, somehow, protected concerted activity. *United States Stove Co.*, 241 NLRB 1402 (1979), (employee's refusal to operate a press because he believed it to be in an unsafe condition *held* protected activity "relating to a matter of common concern"); *Youngstown Sheet & Tube Co.*, 235 NLRB 572 (1978) (individual employee's refusal to perform certain operations to repair a damaged chain, claiming safety reasons, *held* protected concerted activity); *T & T Industries, Inc.*, 235 NLRB 517 (1978) (individual employee's refusal to haul a load because of alleged concern over the condition of the truck lights *held* protected concerted activity); *Varied Enterprises, Inc.*, 240 NLRB 126 (1979) (individual employee's refusal to

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[2] The Court, although noting the availability of the contractual grievance procedure, did not specifically rely upon the "obey-now, grieve-later" doctrine—but instead, refused to approve what has come to be known as the *Interboro* doctrine, *NLRB* v. *Interboro Contractors, Inc.*, 388 F.2d 495, 500 (2d Cir. 1967). We will explore the origins, meaning, and proper reach of that doctrine later in this brief.

drive a trailer alleged to be of illegal length *held* protected concerted activity).

In none of these cases is there any discussion of the obey-now, grieve-later principle, although the Board's holding in each of them is contrary to that principle.[3]

2. The Board's Expanded Application of a Right of Insubordination to Non-Safety Cases Has Met with Further Court Rejection

Although receiving virtually no support from the courts of appeal for its eagerness to characterize individual insubordination in safety cases as protected concerted activity,[4] the Board has nevertheless now expanded Section 7 to justify individual insubordination any time an

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[3] *But see Chemical Leaman Tank Lines*, 251 NLRB 1058 (1980) and *United Parcel Service, Inc.*, 232 NLRB 1114, aff'd *sub nom Bloom* v. *NLRB*, 603 F.2d 1015 (D.C.Cir. 1979) in both of which the Board deferred to arbitration awards sustaining the discharge of employees who claimed a right to refuse allegedly unsafe work assignments.

[4] *But see Banyard* v. *NLRB*, 505 F.2d 342 (D.C.Cir. 1974) where the Court seems to have found that a refusal by an individual employee to perform an assignment violative of a state safety law is protected concerted activity. This case seems completely at odds with that Court's later decisions in *Bloom* and in *Kohls*, cited *supra*. These cases of individual insubordination must, of course, be distinguished from group work stoppages, which, by definition, are concerted activity. There has been support in the courts of appeals for protecting such stoppages even where the contract contains a no-strike clause, either on the ground that the contract (as some do) contains an exception permitting refusals of assignments under certain safety conditions or on the ground that Section 502(c) of the NLRA applies, which Section specifies that the quitting of labor "in good faith because of abnormally dangerous conditions of work" shall not "be deemed a strike." *Wheeling-Pittsburgh Steel* v. *N.L.R.B.*, 618 F.2d 1009 (3d Cir.

(footnote continued)

employee believes he or she is not being properly treated under any provision of the union contract or because of any other protest which the Board is persuaded may be of "common concern" to employees. *See, e.g., Dawson Cabinet Company*, 228 NLRB 290 (1976) (female employee's refusal to perform certain work unless paid at what she alleged was the "male rate" for the job); and *Ontario Knife Company*, 247 NLRB 1288 (1980) (individual employee's refusal of work because she claimed the employer was assigning too much of a certain kind of work to the night shift employees). The courts of appeal have been equally unsympathetic with the Board's expansionary views of Section 7 and its tolerance of insubordination in these cases. *NLRB* v. *Dawson Cabinet Co.*, 566 F.2d 1079 (8th Cir. 1977); *Ontario Knife* v. *NLRB*, 637 F.2d 840 (2d Cir. 1980). *See also E. I. Dupont de Nemours & Company, Inc.*, 262 NLRB No. 126 (1982), *enf. den.*, ... F.2d ....., 113 LRRM 2931 (9th Cir. 1983).

Thus in both safety-related and non-safety-related cases, the courts of appeal have refused to enforce the Board's orders in these cases of insubordination, and have not accepted the Board's view that individual acts of insubordination can be concerted activity within the meaning of Section 7.

(footnote continued)
1980). And, of course, in the absence of a no-strike contract, a concerted work stoppage is normally protected, whether inspired by safety reasons, as in *NLRB* v. *Modern Carpet Industries, Inc.*, 611 F.2d 811 (10th Cir. 1979), or by reason of other kinds of employee dissatisfaction with working conditions, as in *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9 (1962). One court of appeals has also enforced a Board order in what appears to have been an individual act of insubordination, but on the ground that the specific facts of the case warranted finding "sufficient union involvement" to make the activity concerted. *McLean Trucking Co.* v. *NLRB*, 689 F.2d 605 (6th Cir. 1982).

3. Employee Safety is Protected By Safety Laws and Contracts and Warrants No Distortion of Section 7

There was no need for the Board to have embarked on a course of perverting the plain language of Section 7 in order to come to the aid of an employee who may be improperly ordered to perform an unsafe act. There are adequate protections for such employees both in safety legislation and in many collective agreements. As pointed out in the Board's brief (p. 31), Congress has recently enacted legislation specifically directed at precisely this type of a situation in the transportation industry. Section 405(b) of the Surface Transportation Assistance Act of 1982, Pub.L.No. 97-424, 96 Stat. 2157, prohibits the discharge or discipline of any employee:

> . . . for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards, or orders applicable to commercial motor vehicle safety or health, or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment.

Similarly, this Court has held that the Secretary of Labor acted within his authority in promulgating rules and regulations under the Occupational Safety and Health Act, 29 U.S.C. §660(c)(1), 29 C.F.R. §1977.12 (1979), which prohibit an employer from discharging or disciplining an employee who refuses to perform a work assignment because of a reasonable apprehension of death or serious injury, coupled with a reasonable belief that no less drastic alternative is available, and an inability by the employee to obtain corrective action by the employer. *Whirlpool Corp.* v. *Marshall,* 445 U.S. 1 (1980).

Section 502(c) of the National Labor Relations Act, as amended, 29 U.S.C. §143, also makes specific that collective action, even if in breach of a no-strike clause, is permissible if the employees concertedly leave their work "because of abnormally dangerous conditions." But "ascertainable, objective evidence" of the abnormally dangerous conditions is required, and the kind of wholly subjective belief relied upon by the Board in its Section 7 safety cases is insufficient to invoke this claim. *Gateway Coal Co.* v. *Mine Workers*, 414 U.S. 368, 386-387 (1974).

Already some courts have noted that the NLRB has applied a much looser, and essentially subjective standard, for determining whether an employee's refusal of an allegedly unsafe assignment is justifiable. Although the government in its brief here claims that the Board has required that the employee's belief be both honestly held and reasonable (Board's Brief at 24, nt. 12), the Board has not generally applied such a standard. In *Wheeling-Pittsburgh Steel* v. *N.L.R.B.*, 618 F.2d 1009, 1016, n. 15 (3d Cir. 1980), the Court noted:

> . . . the NLRB's position that a good faith belief that working conditions are hazardous need not be reasonable so long as it is sincere.

This is far different from the standard approved by this Court in either *Whirlpool* or *Gateway, supra.*

Collective agreements, including the one in the instant case, also safeguard the employee's right to refuse orders to perform unsafe work, and vary in their delineation of the circumstances under which such refusals are permitted. As mentioned in the *amicus* brief of the AFL-CIO (n. 7, p. 14), the agreement here has two protective clauses, one permitting an employee to refuse to operate unsafe equipment (unless such refusal is "unjustified"), and another prohibiting an employer from requiring an employee to

take out equipment that has been reported by any other employee as being in an unsafe operating condition until the same has been approved as being safe by the mechanical department. These contractual standards, like the standards in safety laws and regulations, require something more than the Board's standard of subjective belief or a mere assertion of reliance on some contract provision. (It will be recalled that in the instant case the Union did not pursue Brown's grievance, apparently because it did not believe his refusal was justified by the contract.)

It may well impede the orderly development and clarification of those safety laws and regulations and of relevant provisions of collective agreements for the NLRB—an agency with no particular expertise in safety matters—to develop its own standards for permitting refusals of allegedly unsafe work assignments under Section 7, which does not even speak to safety issues.

But more seriously, as we have repeatedly pointed out in this brief, the danger in warping and bending Section 7 out of unneeded concern for employee safety lies in paving the way for the Board's subsequent generalized blessing of insubordinate conduct when based upon a subjective alleged belief that the work order contravenes some provision of the collective agreement. For the Board to develop case law in safety matters differing from the case law developing under specific safety statutes and collective agreements is michievous enough. But for these safety cases to serve as a springboard for a generalized protection of insubordinate conduct is not only an unwarranted and insupportable interpretation of Section 7, but it is a dangerous doctrine threatening the well-established, obey-now, grieve-later law of the shop as developed by judicial, administrative, and arbitral tribunals.

C. Individual Actions Are Protected by Section 7 Only if They Are in Furtherance of Contractual Grievance Procedures or if They Are an Integral Part of Group Action

Both the Board's brief and the excellent *amicus* brief of the AFL-CIO make much of the need to protect the integrity of collectively bargained grievance procedures. They correctly point out that this Court has specifically held that the grievance arbitration procedure of a collective agreement "forms an integral part of the collective bargaining process." *Metropolitan Edison Co.* v. *NLRB*, ... U.S. ....., 51 U.S.L.W. 4350, 4354 (April 4, 1983); *Conley* v. *Gibson*, 355 U.S. 41, 46 (1957).

Both the Board and the AFL-CIO erroneously seek to use that premise to urge this Court to affirm the Board here, arguing that the Board's decision was consistent with, although perhaps an extension of, the Board's controversial *Interboro* doctrine. *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966), *enf.*, *NLRB* v. *Interboro Contractors, Inc.*, 388 F.2d 495 (2nd Cir. 1967). The *dicta* in *Interboro* has been relied upon by the Board to support rulings which do not rest on a need to protect orderly grievance procedures. Indeed, the Board has relied upon it to support protecting a wide variety of individual employee complaints arising in contexts totally outside any contractual grievance machinery.

The facts of the *Interboro* case may have justified a need for protecting the contractual procedures. There the employee had made complaints to his foreman concerning alleged violations of the collective agreement. In view of the Board's holding that the making of the complaint to the foreman under the facts of that case constituted the filing of a grievance within the framework of the contract,

it is understandable that both the Board and the court recognized a need to protect the integrity of the contractual grievance machinery.

A like need has been recognized in other cases such as *NLRB* v. *Adams Delivery Serv., Inc.*, 623 F.2d 96, 100 (9th Cir. 1980). There the court enforced a Board order protecting the right of an employee to make a complaint to his union, which complaint had been transmitted by the union to the employer. As the Court said:

> Where an employee enlists the aid of the union to enforce a contractually guaranteed employment right, the need to employ a fiction of group activity vanishes . . . Our decisions indicate a strong preference that the established grievance procedure be used to resolve employment disputes, and to hold otherwise would ignore the importance of the counseling function which the union serves in these matters.

Id. at 100.

In *Interboro*, however, the court, in *dicta*, used language which has been frequently quoted and has been subject to much controversy. The court said:

> . . . activities involving attempts to enforce the provisions of a collective agreement may be deemed to be for concerted purposes even in the absence of . . . interest by fellow employees.

Id. at 500.

There has been much debate and disagreement and much discussion about whether other circuits should accept or reject this so-called *Interboro* doctrine. If one looks to the facts of these cases rather than to the arguments of the various courts about the precise meaning of that oft-quoted *Interboro dicta*, however, one finds that when the Board has sought to utilize this *dicta* to extend *Interboro* to fact situations involving employee

complaints outside the framework of a contractual grievance procedure, it has had little success in the courts.

In *N.L.R.B.* v. *Buddies Supermarkets, Inc.*, 481 F. 2d 714 (5th Cir. 1973), the court denied enforcement of a Board order which attempted to protect an employee who was trying to get a more favorable contract for himself than the employer had made available for his fellow employees. In denying enforcement, the court noted that the employee's acts:

> . . . did not arise in the framework of an attempt to enforce an existing collective bargaining agreement.

Id. at 719.

In *Roadway Express* v. *NLRB*, ... F.2d ....., 112 LRRM 3152, 3153 (1983), when an employee insisted on taking time away from his work duties to complain about a matter which had already been resolved by the grievance procedure, the court of appeals for the Eleventh Circuit denied enforcement of the Board order. An employee's attempt to *reject* a dispute resolution achieved through the contractual grievance procedure surely does not protect that procedure.

In *ARO, Inc.* v. *NLRB*, 596 F.2d 713 (6th Cir. 1979), the court refused to enforce a Board order protecting an individual complainant who was a temporary employee and had no contractual right of access to the established grievance machinery. The court noted:

> The Board's decision and order creates, in effect, grievance rights for temporary/probationary employees, by the filing of an unfair labor practice, which do not exist under the collective bargaining agreement.

Id. at 718.

In *Mushroom Transportation Co.* v. *N.L.R.B.*, 330 F.2d 683, 685 (3d Cir. 1964), another court of appeals refused to enforce a Board order which sought to protect complaints

by a temporary employee who was not covered by the collective bargaining agreement.[5]

Again in *N.L.R.B.* v. *Northern Metal Co.*, 440 F.2d 881 (3d Cir. 1971), the same circuit denied enforcement of a probationary employee's complaint which was not subject to the contract's grievance procedure, and where the Union had clearly indicated to the employee that he did not have rights under the agreement.

In yet another case, a court refused to apply *Interboro* when there was no collective contract in effect. In *Indiana Gear Works* v. *N.L.R.B.*, 371 F.2d 273 (7th Cir. 1967), the court denied enforcement of a Board order which sought to protect the right of an individual employee to display cartoons ridiculing the employer's president and its latest wage increase. There was no collective bargaining agreement in effect; nor, in fact, were the employees represented by any union. Obviously, since there was no contract in effect, there was no negotiated grievance procedure in place and, therefore, no issue of protecting the integrity of such procedures.[6]

As noted in the AFL-CIO *amicus* brief (p. 8), courts have also disapproved the Board's attempted extension of its *Interboro* doctrine to protect individuals who make a complaint not grounded in a collective agreement, but complaining instead of an alleged statutory violation or

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[5] The Court's opinion in *Mushroom* states that employee activity should be regarded as concerted only if "engaged in with the object of initiating or inducing or preparing for group action." When the employee activity is something other than invoking collectively bargained grievance procedures, this seems sound.

[6] The Court in this case approved the test for concerted activity utilized by the Third Circuit in *Mushroom Transportation Co.* v. *N.L.R.B.*, *supra*.

other matters of "common concern." *See, e.g., Ontario Knife* v. *NLRB*, 637 F.2d 840, 845 (2d Cir. 1980). Courts have been similarly unwilling to extend protection under *Interboro* to employees who do not even assert a contractual basis for their complaints. *See, e.g., NLRB* v. *C & I Air Conditioning, Inc.*, 486 F.2d 977, 979 (9th Cir. 1973), where the court adopted the dissenting view of one of the authors of this brief, who was then Chairman of the National Labor Relations Board.

The courts' opinions in these cases have offered a considerable variety of rationales for their results. But we suggest that the facts speak more convincingly than the legal debates. The courts will protect individual complaints which are either a proper exercise of contractual grievance rights or if the individuals are acting in concert with other employees or preparing to do so. Those results are totally consistent with the intent and purpose of Section 7.

Because it is our view that *Interboro* cannot and should not be extended to protect individual insubordination, we do not believe that this Court need here fully delineate the precise extent of *Interboro's* permissible reach. The Board, however, urges upon this Court a need to respect and affirm the so-called *Interboro* doctrine. If, as a result of the Board's contentions, the Court utilizes its opinion in this case as a vehicle for defining the proper limits of *Interboro*, we urge that Section 7 not be expanded to protect individual rights except when essential to protect the integrity of collectively bargained grievance procedures. Where there is in effect no collective agreement, or where the complaint has already been resolved in the grievance procedure, or where the individual has no right of access to grievance procedures because, for example, he is in probationary status, or because there is no contract and hence no established grievance procedure,

then we suggest that individual complaints[7] do not come within the intended scope of Section 7. In such cases the test laid down by the circuits in such cases as *Mushroom Transportation* and *ARO* to the effect that the individual action is protected only if made with the object of inducing or preparing for group action would seem entirely appropriate.

D. Whatever the Proper Reach of the Interboro Doctrine, It Should Not Protect Individual Acts of Insubordination

Whatever the appropriate reach of Section 7 in protecting the integrity of collectively bargained grievance procedures, however, it need not and should not be extended to protect individual acts of insubordination. An act of insubordination is not, as the AFL-CIO would have it, a mere clumsy attempt to submit a dispute to the grievance procedure (AFL-CIO brief, p. 12). It is the very antithesis of the kind of orderly dispute resolution typified by grievance discussions. Insubordination by an employee is a highly individualized and confrontational act.

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[7] The AFL-CIO is correct in stating that there is not always a clearly determinable line to separate "grievances from complaints." It is also true, again as stated by the AFL-CIO in its brief, that in many grievance procedures, the first step is for the affected employee to meet with the supervisor, perhaps not even with a steward, in order to discuss the grievance. But it is no arduous task for the Board or the Court to determine whether there is in effect such a grievance procedure and to determine whether the individual was attempting to utilize it in an orderly fashion. The tests suggested by this brief should not, therefore, pose any serious interpretative difficulties.

Nor is the AFL-CIO correct in suggesting that the Court need not reach this aspect of the case because it concerns whether the activity is "protected" rather than whether it is "concerted." Brown's refusal to drive the truck, here, was a clearly individual, not a concerted, act.

Two people were not directed to drive the truck. Only one was.

Two people did not refuse to drive the truck. Only one did.

Brown's act was simply not concerted. Whatever the appropriate reach of the *Interboro* doctrine, it does not and should not extend to fictionalize as "concerted" such an act of individual insubordination.

Reversal of the Board and denial of enforcement of its order here is supportive and protective of the integrity of contractual grievance procedures. To enforce the Board's order and to validate individual acts of insubordination, rather than resort to orderly grievance processes, is destructive, not supportive, of Section 7 rights.

CONCLUSION

The decision of the Court of Appeals for the Sixth Circuit should be affirmed, and the complaint herein should be dismissed.

Respectfully submitted,

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